

**Attorney General  
Betty D. Montgomery**

June 16, 1995

DOCKET FILE COPY ORIGINAL

*Via Overnight Mail*

Federal Communications Commission  
Room 222  
1919 M Street, N.W.  
Washington, D. C. 20554

**RECEIVED**

**JUN 19 1995**

**FCC MAIL ROOM**

Re: *In the Matter of the Petition of the  
State of Ohio for Authority to  
Continue to Regulate Commercial  
Mobile Radio Service, PR Docket No.  
94-109*

To Whom It May Concern:

Enclosed please find the original and ten copies of the **Petition for Reconsideration** in the above-referenced matter. Please return a time-stamped copy to me in the enclosed stamped, self-addressed envelope

Thank you for your assistance in this matter.

Respectfully submitted,

**Ann E. Henkener**  
Assistant Attorney General  
Public Utilities Section  
180 East Broad Street  
Columbus, Ohio 43266-0573  
(614) 466-4397

AEH/kja

Enclosure

No. of Copies rec'd  
List A B C D E

0+10

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

RECEIVED

JUN 19 1995

In the Matter of: )  
)  
Petition of the State of Ohio for )  
Authority to Continue to )  
Regulate Commercial Mobile )  
Radio Service. )

PR Docket No. 94-109

FCC MAIL ROOM

DOCKET FILE COPY ORIGINAL

**Petition for Reconsideration**

On August 9, 1994, the Public Utilities Commission of Ohio (PUCO) filed a Statement in the above referenced proceeding with the Federal Communications Commission (FCC). The intention of the PUCO in filing its Statement was to inform the FCC of the PUCO's non-rate regulatory authority over intrastate commercial mobile radio services (CMRS) providers, and to preserve the PUCO's right to pursue more traditional rate and market entry regulation in the future. Statement at 4. The FCC treated this statement as a petition to retain state regulatory authority over the rates for CMRS. On May 4, 1995, in a Report and Order released on May 19, 1995, the FCC denied Ohio's petition. The FCC also indicated that "[e]stablishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions requires a more fully developed record than is presented by the Ohio Petition and related comments." Report and Order at 42. The FCC further required that "to the extent any interested party seeks reconsideration on this issue, it will specify with particularity the provisions of the Ohio regulatory practice at issue." Report and Order at 44.

Ohio's statement filed August 9, 1994 described the PUCO's continuing intrastate jurisdiction over wholesale cellular companies. The PUCO indicated that

it did not set rates or limit market entry. Statement at 1. The PUCO also indicated that it has statutory responsibility to hear complaints concerning discriminatory practices and the setting of rates at below cost for the purpose of destroying competition. Specifically, the Ohio Revised Code 4905.33 provides:

No public utility shall directly or indirectly, or by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or receive from any person, firm, or corporation a greater or lesser compensation for any services rendered, or to be rendered, . . . than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under substantially the same circumstances and conditions. No public utility shall furnish free service or service for less than actual cost for the purpose of destroying competition.

Ohio Revised Code 4905.35 provides:

No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.

On October 22, 1993, the PUCO issued its Finding and Order in *In the Matter of the Commission Investigation Into Implementation of Sections 4927.01 through 4927.05, Revised Code, as they Relate to Competitive Telecommunication Services*, Case No. 89-563-TP-COI. Relevant portions of this Finding and Order are attached as Exhibit A. In that case, the PUCO indicated it was going to continue to investigate, on an ongoing basis, the development of resale competition within the cellular industry. In that same order, the PUCO suspended its rate regulation of wholesale cellular providers.

On October 18, 1993, Westside Cellular, Inc., dba Cellnet (Cellnet) a retail cellular provider filed a complaint with the PUCO requesting that the PUCO find that certain wholesale cellular providers, specifically GTE Mobilnet, the New Par

Companies, Ameritech Mobile Communications, Inc., and Youngstown Cellular Telephone Co., were in violation of the above statutes along with several PUCO orders implementing these statutes. *In the Matter of the Complaint of West Side Cellular, Inc. dba Cellnet of Ohio, Inc.*, Case No. 93-1758-TP-CSS. Specifically, Cellnet requested that the PUCO find that the respondents did not maintain separate accounting records for their wholesale and retail operations in violation of PUCO orders, that the respondents had been unlawfully cross-subsidizing their retail operations with profits generated through their wholesale operations, and that the respondents provided service to their retail operations at rates lower than those which they offered to Cellnet. The PUCO has not yet concluded its adjudication of the complaint.<sup>1</sup> The PUCO is making every effort to provide an expeditious resolution to this complaint. The final adjudication of the complaint may provide the "more fully developed record" referenced in the Report and Order at 42 which would permit the FCC to establish a demarcation between preempted rate regulation and retained state authority over terms and conditions. It would be poor public policy for the FCC to cut off efforts by the states to adjudicate cellular complaints which address claims of discrimination and which can provide the full, developed record to the FCC which the FCC requires to make its determinations in the instant case.

Accordingly, the PUCO requests that it be permitted to supplement this Petition for Reconsideration with results of the adjudication of the above referenced complaint should the PUCO's decision in that complaint provide information

---

<sup>1</sup> The PUCO had been attempting to move the complaint case to hearing and determination in an expedited manner. However, on April 17, 1995, GTE Mobilnet of Ohio and the New Par Companies filed a Complaint and a Motion for Preliminary Injunction with the United States District Court, Southern District of Ohio, requesting that the Court enjoin the PUCO from exercising jurisdiction over GTE Mobilnet of Ohio and the New Par Companies. On April 27, 1995, the Court issued an Agreed Order in which the PUCO agreed it would not seek sanctions or penalties against GTE Mobilnet of Ohio and the New Par Companies for failure to comply with PUCO orders concerning discovery, pending ruling on the Motion for Preliminary Injunction. To date, no ruling concerning the Motion for Preliminary Injunction has issued.

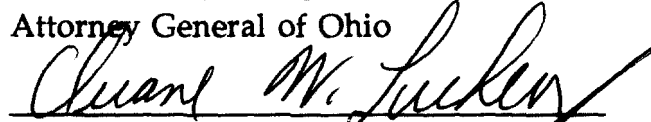
which would be relevant to the FCC's determinations in the instant case and that the FCC indicate its willingness to accept such information in ruling upon the demarcation between preempted rate regulation and retained state authority over terms and conditions. The PUCO hopes to expedite the parties' presentation of evidence so that a record and decision can be obtained in a timely manner to aid in this determination.

Respectfully submitted,

ON BEHALF OF THE PUBLIC UTILITIES  
COMMISSION OF OHIO:

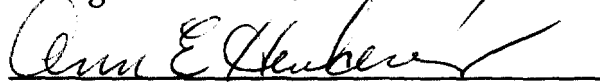
**BETTY D. MONTGOMERY**

Attorney General of Ohio



**DUANE W. LUCKEY**

Acting Section Chief



**ANN E. HENKENER**

Assistant Attorneys General

Public Utilities Section

180 East Broad Street

Columbus, OH 43215-3793

(614) 466-4396

FAX: (614) 644-8764

## BEFORE

## THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission In- )  
 vestigation Into Implementation of )  
 Sections 4927.01 Through 4927.05, ) Case No. 89-563-TP-COI  
 Revised Code, as They Relate to Com- )  
 petitive Telecommunication Services. )

FINDING AND ORDER

The Commission finds:

I. BACKGROUND

The regulatory framework established in Ohio for providers of competitive telecommunication services (CTSs) has been steadily evolving over approximately the past decade. The Commission first addressed the need for establishing such a framework in its April 9, 1985 Finding and Order in In the Matter of the Commission Investigation Into the Regulatory Framework for Telecommunication Services in Ohio, Case No. 84-944-TP-COI (944). The fundamental theory underlying the Commission's traditional regulation of telephone utilities, which had applied universally until the time of the 944 order, was based on the premise that telephone utilities were natural monopolies not constrained by the forces of the market in setting rates and managing their operations. In its 944 order, however, the Commission recognized that, due in part to both technological developments and the emergence of a new federal regulatory approach, many segments of the telecommunications industry were, by then, no longer characterized by the monopolistic behavior of a few players, but rather by a burgeoning of entities looking to compete in a competitive telecommunications marketplace. Accordingly, the Commission decided that its traditional regulatory approach should be relaxed and streamlined in a manner which would more appropriately address the realities of the competitive environment which, by then, was evolving within at least certain parts of the industry.

Under the 944 framework, the Commission retained full regulatory jurisdiction over providers of CTSs, including over market entry and exit, the setting of rates for service, establishment of new services, and the adequacy and quality of service. However, significant ratemaking flexibility was afforded to CTS providers so that they would be able to respond quickly to market forces. The 944 order permitted companies with competitive service offerings to establish a range of rates which must be approved by the Commission. Once approved, the companies would have the flexibility to move upward or downward within the range without necessitating Commission action.

other element is intent to destroy competition. The type or degree of evidence required to satisfy the complainant's burden of proof regarding intent to destroy competition is best reserved for determination on a case-by-case basis where unique fact patterns are likely to prevail. Accordingly, the Commission does not believe it is necessary to adopt the universally applicable rebuttable presumption proposal contained in the staff draft.

#### 11. Notification In General

Within the 563 guidelines, the Commission expressly reserves its authority to require, review, and approve customer notices in situations where the Commission determines that such notices are necessary in order to address appropriately the public policy ramifications presented by any CTS.

#### 12. CTS Providers Affiliated With LECs Operating In Ohio

Recognizing that there are many CTS providers in Ohio who are affiliated with LECs operating in Ohio, the Commission has incorporated several provisions into the 563 guidelines which are designed to prevent cross subsidization and anti-competitive conduct. These provisions essentially set forth the Commission policies as determined in two earlier cases. See In the Matter of the Application of United Telephone Long Distance, Inc. for Authority to Furnish Interexchange Telecommunications Services In Ohio, Case No. 86-2173-TP-ACE (December 7, 1988) and In the Matter of the Application of Ameritech Advanced Data Services of Ohio, Inc. for Authority to Provide Statewide Data Services, Case No. 93-1081-TP-UNC (August 19, 1993).

#### 13. Temporary Waivers For RCCs

Cellnet, a reseller of cellular service, argues that the cellular industry is not competitive, and that there are no reasonably available alternatives to cellular service. Cellnet alleges that non-affiliated cellular resellers cannot turn a profit because an anti-competitive atmosphere exists in which cross subsidization occurs between wholesale cellular carriers and their cellular reselling affiliates. Consequently, very few non-affiliated resellers of cellular service exist in Ohio. Cellnet further contends that cellular licensees in Ohio, in both the wireline and non-wireline markets, are predominately owned by monopoly telephone companies, leading to opportunities for wholesale cellular operations to be cross subsidized by monopoly service ratepayers. In addition to asking the Commission to launch a new investigation into whether Ohio cellular carriers are engaged in anti-competitive behavior, Cellnet has proposed some specific steps which should be taken to make the industry more competitive.

All of the cellular carriers who commented on this topic believe that competition is extensive in the Ohio cellular arena. They make a number of observations in support of their claim. Direct competition exists between two well-established, aggressively managed, and well-financed licensed carriers, their agents, and non-affiliated, unregulated resellers. Customers are free to move very easily from one carrier to another. According to the commentators, there are several easily accessible, wireless, lower-priced, substitutes for cellular service, including digital display and alphanumeric display paging service, private 2-way radio dispatch systems, citizens band radios, household cordless phones and payphones. Further, they allege, new technologies including personal communication service (PCS) and an enhanced mobile radio service with full connectivity to the public switched telephone network are expected to be available by mid-1994.

Only Cellnet commented in support of the position taken by the staff in its initial recommendation that the Commission has jurisdiction over affiliated resellers. According to Cellnet, the Commission has statutory jurisdiction over all operations of public utilities and there is no provision which limits jurisdiction to a utility's wholesale functions. By contrast, all the cellular carriers who commented in response to the staff's initial recommendation discourage the staff suggestion that the Commission should impose jurisdiction over affiliated resellers. They think the staff's position is both wrong and also a complete reversal of an earlier finding by the Commission that, as a matter of law, resale of cellular service is not within the Commission's jurisdiction.

The Commission finds that the cellular market now warrants a further relaxation of regulatory oversight, as provided in the 563 guidelines being adopted today. The cellular industry structure, as mandated by the FCC, has restricted competition within each licensed service area to two, and only two, cellular providers. While it is unclear whether a duopoly industry structure may provide the same degree of competition as would be found in a market consisting of many relatively small providers, with none enjoying significant market share, the cellular industry structure of two large, generally well-financed and aggressively managed providers may result in product availability pursuant to terms, conditions, and prices that are equivalent or superior, from the consumer's perspective, to those that would prevail in a traditionally regulated environment. Additionally, the licensees' market conduct ought to be influenced and moderated by the availability of other services that can be used as substitutes for one or more of the communication attributes of cellular service, although none of the currently available substitutes cited by the cellular industry

provide a coextensive range of functionalities or conveniences when compared to cellular telephone service.<sup>1</sup> Most importantly, the Commission recognizes that currently cellular service is almost exclusively a mobile communications service and thus satisfies a need or convenience that is unlike traditional telephone wireline service. In other words, cellular telephone service at this time has not evolved beyond what is generally considered to be a premium discretionary or convenience service. Whether or not it will do so in the future remains to be seen. Whether or not the FCC mandated industry structure of only two providers per market coupled with both current and future functional substitutes will be sufficient to impose the degree of market discipline necessary to obviate any need for regulation also remains to be seen.

On balance, the Commission believes that the foregoing factors and considerations justify finding cellular telephone service to be a CTS, but do not yet justify its deregulation. As discussed above, the cellular industry is rather unique among competitive telephone services. Congress has restricted rate regulation and the FCC has severely restricted market entry and thus direct competition. The industry alleges that any regulation is unnecessary and, in fact, counterproductive to a fully competitive market. The Commission still has substantial reservations respecting the industry's claim that consumers will achieve better prices and service in a nonregulated environment. Nevertheless, the Commission is willing, for the reasons stated herein, to test the industry's claims of more competitive prices and service as regulatory requirements are minimized. This decision results in part from the Commission's desire to limit regulation where conditions and circumstances indicate a reasonable probability that such action will not adversely affect consumers, may result in superior prices and service, and such action is subject to subsequent review of the results realized. Therefore, the Commission, on its own motion, is temporarily waiving the tariff and contract filing provisions of the 563 guidelines related to services provisioned by the underlying wholesale carrier to its non-utility resale or end user customers. The Commission notes that the filing requirements related to contractual arrangements including mergers, transactions between two utilities, transfers of certificates, and changes in ownership will remain effective. The Commission will maintain the

---

1. In this regard, the Commission is encouraged by recent action of the FCC allocating 160 MHz of spectrum for new personal communications services that will be licensed to up to seven providers in each market. The future deployment of PCS may very well provide an equivalent substitute or competitor to cellular, in which case the two provider structure of the cellular industry would become a matter of no regulatory concern. See Second Report and Order, Gen. Docket 90-314, FCC Report No. 93-415, Adopted September 23, 1993.

requirement contained in the 944 order which provides that a cellular reseller which is affiliated with the wholesale cellular carrier and which is not involved in any manner with routing, transmitting, receipt of signals, or conversion of signals, will not be considered a CTS provider or telephone company, provided the affiliated reseller's operations are maintained under a separate set of accounting records from the operations of the wholesale cellular provider, and further provided the affiliate reseller has no involvement whatsoever in the wholesale cellular provider's operations.

The Commission concurs with the FCC that resale of cellular service is in the public interest for the reasons stated by the FCC in In the Matter of an Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, 86 FCC 2d 469, 510 (1981). The Commission further finds that permitting persons other than just the licensees to package and market use of the cellular spectrum space may maximize its potential societal benefits beyond those to be attained solely through the efforts of the licensee. Therefore, in order to prevent frustration of the public policy respecting resale, it is necessary that the cellular licensee provide access to its cellular service pursuant to terms, conditions, and prices that are universally available on a non-discriminatory basis to all customers, affiliated and non-affiliated alike. The maintenance of a separate set of accounting records by the underlying carrier will facilitate a review of the fulfillment of this policy by permitting a subsequent review of transactions between the underlying wholesale carrier and its affiliated reseller in order to determine whether or not the affiliated reseller received access to any cellular services, or any component bundled therewith, at prices and/or terms and conditions different from those available to non-affiliated resellers. In addition to requiring the underlying wholesale carrier to maintain a written detailed record of transactions between it and its affiliated resale or end user customers, the Commission will also require the underlying wholesale carrier to maintain written comprehensive records of all inquiries from potential resale customers and all transactions entered into between it and unaffiliated resellers, thus enabling the Commission to review all terms, conditions, and prices quoted and effectuated between the underlying wholesale carrier and its customers.

For similar reasons, the Commission will also temporarily waive, again on its own motion, the tariff and contract filing guidelines in 563 related to services provisioned by the paging and mobile providers to their non-utility resale and end user customers. The Commission notes that the filing requirements related to contractual arrangements including mergers, transactions between two utilities, transfers of certificates, and changes in ownership will remain effective. Cellular, paging, and mobile telephone services share many of the same attributes. They are

principally mobile, satisfying a need or convenience different from traditional wireline telephone service. Unlike cellular, however, paging and mobile services have been broadly available in the marketplace for many years and, thus, are relatively mature and stable industries. Also, unlike cellular, entry into the paging business is not absolutely constrained by licensing limitations. Mobile telephone service is the closest functional substitute for cellular, but is not as readily available nor as easy to use as cellular. These radio based services are competitors, at least to some extent, within the broader mobile communications market. Also, because of the competitive circumstance, i.e., reasonably available alternatives, involving current radio based telephone services, all of the services should be treated equally in the absence of significant factors compelling a different conclusion. Accordingly, the Commission will waive, on its own motion, the tariff and contract filing requirements of the new 563 guidelines, related to services provisioned by the providers to their non-utility and end user customers subject to the review discussed below.

The waiver of the tariff and contract filing provisions of these guidelines for cellular, mobile, and paging services will sunset, in the absence of further action by the Commission, on December 31, 1997. Commencing on or about July 1, 1997, the Commission will undertake a comprehensive review of the state of the cellular, mobile, and paging industry within Ohio. The purpose of this review is to determine whether or not the temporary waivers approved herein should be terminated or extended on either a temporary or permanent basis. The review will also focus on all of the other provisions of the 563 guidelines as they apply to the cellular, mobile, and paging industries for the purpose of determining which provisions, if any, should be modified, waived, or terminated as circumstances within the industry may dictate at that time. Specifically, the Commission will review each of the following topics:

1. The extent to which the entire state is being provided paging and mobile service, including the number of such companies, compared to similar markets and carriers in other states in the region.
2. The extent to which wholesale cellular, mobile, and paging prices are consistent with prices of similar carriers in similar markets in other states in the region, segregated to the extent possible by the degree of regulation imposed in those jurisdictions.
3. The extent to which each cellular carrier is providing service geographically throughout their metropolitan statistical area (MSA) or

rural service area (RSA), as well as the number of carriers operating in each RSA.

4. The extent to which cellular carriers have unbundled their services and rates, so that non-radio components of current cellular service, including roaming service, can be substituted by competitors or resellers, compared to other states in the regions.
5. The extent to which cellular providers are providing basic local exchange service within any other states in the region.
6. The extent to which cellular carriers, mobile providers, and paging providers are subject to competition from available alternatives, particularly new services like PCS.
7. The extent to which unaffiliated resellers are serving each cellular market and each cellular carrier, compared to similar markets and carriers in other states in the region.
8. The extent to which market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory.

Interested entities may also propose for Commission consideration other topics to be reviewed. Additionally, the Commission, based on its own experience, may consider additional topics for review.

On July 1, 1997, each cellular carrier, paging provider, and mobile service provider shall submit to the staff whatever information, data, or testimony it desires the Commission to consider as part of the review process. All cellular carriers shall submit to the staff the number of unaffiliated resellers currently purchasing service and the minutes of use of each reseller, without identifying the name of the reseller, for each calendar month during the 24-month period ending with May 1997, and a map or plot identifying the portion of the MSA or RSA where service is then available. All paging and mobile service providers shall submit a detailed description of the areas in which they are actually providing service. In addition, other interested persons and entities may submit information to the staff for consideration in the 1997 review process.

## **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing **Petition for Reconsideration** submitted on behalf of the Public Utilities Commission of Ohio was served by regular, U.S. mail, postage prepaid or hand delivered to the parties of record on this 19th day of June, 1995.

A handwritten signature in dark ink, appearing to read "Ann E. Henkener", is written over a horizontal line.

**ANN E. HENKENER**  
Assistant Attorney General

**PARTIES OF RECORD**